

**FLATHEAD COUNTY BOARD OF ADJUSTMENT  
MINUTES OF THE MEETING  
FEBRUARY 2, 2010**

**CALL TO  
ORDER**

A meeting of the Flathead County Board of Adjustment was called to order at approximately 6:00 p.m. Board members present were Gina Klempel, Scott Hollinger, Mark Hash, Gary Krueger and Craig Wagner. Allison Mouch, Andrew Hagemeyer and Jeff Harris represented the Flathead County Planning & Zoning Office.

There were 10 people in the audience.

**APPROVAL OF  
MINUTES**

Klempel motioned and Hash seconded to approve the November 3, 2009 minutes. The motion passed unanimously.

**PUBLIC  
COMMENT  
(not related to  
agenda items)**

None.

**ELECTION OF  
NEW BOARD  
OFFICERS**

Wagner nominated Hollinger for chair. The motion passed by quorum.

Klempel nominated Wagner for vice chair. The motion passed by quorum.

**MB TRUST c/o  
MTN. HIGH  
CONSTRUCT-  
ION  
(FZV 09-07)**

A request by Peter Hoveland-Mountain High Construction, Inc. for a Zoning Variance to property within the Bigfork, R-4 (Two-Family Residential) Zoning District. The applicants are requesting a variance to Section 3.12.040 (3)(B), the front yard setback, of the Flathead County Zoning Regulations. The property is located at 122 Sunset Drive in Bigfork.

**STAFF REPORT**

Andrew Hagemeyer reviewed FZV 09-07 for the board.

**BOARD  
QUESTIONS**

Wagner asked if there were other properties which had built into the sewer line area.

Hagemeyer said the property to the north had.

Wagner asked if they had approval.

Hagemeier said he did not know the exact situation, but it would not have occurred under the present management of Bigfork Water and Sewer.

Krueger asked if the property to the north was outside of the road setback.

Hagemeier said from the observation he was able to perform, it appeared to meet the setback.

Krueger and Hagemeier discussed briefly the specifics of the setbacks.

Hash asked Hagemeier for clarification on the conditions.

**APPLICANT  
PRESENTATION**

Peter Hoveland, Mountain High Construction, handed the board and staff a map of an alternative placement of the garage. He explained the modifications. He clarified the setback of the property to the north of them who built along the sewer line.

**BOARD  
QUESTIONS**

The board and Hoveland discussed the esthetics of the plan, other agency reviews of the application, the discovery of the manhole, clean out locations of the sewer line, the possibilities of Bigfork Water and Sewer excavating the existing line, additional expenses with turning the garage, the Road and Bridge Department's thoughts on the new plan, damage done to property the Road and Bridge were liable for, excluding the county from damage done due to snow plowing, and the fact Bigfork Water and Sewer not knowing exactly where the water line was on the property,

Hagemeier said the Bigfork Land Use Advisory Committee did recommend approval.

**PUBLIC  
COMMENT**

None.

**BOARD  
DISCUSSION**

The board, staff and the applicant discussed at length the merits of the alternative construction option presented earlier, structure area potentially in the setback area, the road and bridge department's opinion of the application, the garage orientation to the road, whether the conditions presented in the staff report would apply to the new site plan, parking options with the new orientation of the garage, options for minimizing parking motor vehicles between the garage and road, traffic on the road,

potential safety issues and if the board could tell the applicant where they had to park their cars, or just where they could put the garage.

**MAIN MOTION  
TO ADOPT  
F.O.F.  
(FZV 09-07)**

Hash motioned and Wagner seconded to adopt staff report FZV 09-07 as findings-of-fact and approve with the deletion of condition 1, the amendment of condition 2 to state the following: *The landscaping and/or fence will define the area so no parking will be feasible in front of the structure for motor vehicles and this does not exclude small hauling trailers, four wheelers, and the like and this does also not exclude motor vehicles that can park entirely within the property lines*, and the addition of a new condition stating the variance should only be for 9 feet.

**ROLL CALL  
TO APPROVE  
FZV 09-07  
WITH  
CONDITIONS**

On a roll call vote the motion passed unanimously.

**NODDING  
ONION  
(FZV 09-08)**

A request by Nodding Onion, LLC for a Zoning Variance to property within the Lower Side, I-1H (Light Industrial Highway) Zoning District. The applicants are requesting a variance to Section 3.28.050 (1)(D) of the Flathead County Zoning Regulations which states all private drives, access roads and required customer/employee parking areas to be a hard surface using either asphalt or concrete. The property is located 980 Demersville Road in Kalispell.

**STAFF REPORT**

Allison Mouch reviewed staff report FZV 09-08 for the board.

**BOARD  
QUESTIONS**

Krueger asked if the CUP the board issued for Nodding Onion had a condition concerning approach permits.

Mouch pointed out in the copies she gave the board before the meeting of the staff report for the Nodding Onion CUP where the conditions for the permit were and explained them.

Mouch and Krueger discussed the conditions concerning the approaches, if the existing buildings needed paving when they were constructed, and what exactly the board gave the conditional use for.

Mouch explained the history of the site and what triggered events which lead to the application before the board now.

Krueger asked if the CUP was for all the buildings on the lot.

Mouch said yes and explained the history of the lot and semantics of the CUP.

Krueger and staff discussed at length what was and was not included in the CUP for Nodding Onion and what the application before them included.

**APPLICANT  
PRESENTATION**

Zach Andrews, Nodding Onion, LLC, explained the site layout and history of the property and the history of the permits to date. His position was the buildings which were being asked to be paved around were cruddy buildings which were inherited with the land when they purchased the property and it would cost more to pave then the buildings were worth and paving would be incredibly difficult. He explained the difficulties involved with paving and what had been done so far to mitigate drainage and dust problems. He also spoke of a neighbor of the property who was doing the same plan they had enacted on their property because they were impressed with its effectiveness.

**PUBLIC  
COMMENT**

None.

**STAFF  
REBUTTAL**

Mouch said staff's proposal would not place paving over the storm water basins which were in place, especially the retention area in front of the storage units. That would not be an issue under the alternate proposal. She clarified where the water would be intended to be collected on site. She was not an engineer but had spoken to one and had received the information that if the basins were unable to handle the increase runoff, it was not cost prohibitive to remedy the situation.

**BOARD  
DISCUSSION**

Hollinger asked the applicant for clarification on what businesses were operating in the buildings in the area where paving was recommended.

Andrews said the issue was the topography of the site routed all the water from the site to the buildings. They would need to figure out how to pump that water somewhere. Sloping away from the building was not achievable.

Cork Andrews explained in detail what would need to happen to route the water away from the buildings.

Hollinger asked if the reason for paving around the mini storage was for dust.

Mouch said what staff proposed was not paving from one end of the area on the site to the other. She clarified for the board which area she was speaking about. It was for dust and also because it was a requirement of the zoning regulations for that zone.

Hollinger said his observation was mini storages did not tend to be high traffic facilities. He could understand if there were some other business traffic in the surrounding areas, certainly for some routing and parking areas.

The board, staff and applicant discussed other options for areas to pave, what other vehicles used the area, access to the site, the fact the regulations require pavement, a possible rewrite of the storm water plan in effect, the history of what had been done on the property concerning traffic so far and the option of paving 100 or 200 feet at the access road.

Harris said the applicant was before the board tonight to ask for a variance to their CUP which would negate condition #4 and that was what was before them tonight, not the CUP, not negotiating so much as what would be mitigation, but rather what the board's opinion or decision would be concerning if a variance to the county's regulations would be okay. What the staff report suggested was based on their application, where the applicant wanted a variance to the entire performance standard tied to a highway industrial zoning district. Staff's evaluation was that the applicant did not meet the criteria required for a variance. Mouch tried to find a solution and present it as alternative B. If the applicant was unwilling to consider the alternative and fell back on their original application asking for a complete variance, then staff could not support the variance.

Hash recounted the history of the solution of paving for primarily dust abatement. He was concerned about the repercussions of such actions down the road especially concerning water drainage. In this case they granted the conditional use permit and knew asphalt was an issue for the applicant. He clarified the only reason they were requiring paving was not for dust abatement, but for dust elimination.

Mouch said the point of the requirement in the conditional use permit was to require the applicant to conform to the performance standards of the zoning district.

Hash was looking for the purpose of that requirement.

Mouch said yes, dust abatement was the original purpose behind that requirement.

Hash and Mouch clarified and discussed the reasons behind the requirement for paving in an I-1H zoning district and other businesses in the zoning area that the planning office never saw because they had met the requirements for an I-1H zoning district.

Harris clarified why the I-1H district existed, the performance standards for the district and why they existed.

Hash said now they were trying to come to a compromise with the requirements for the applicants. He thought the board had to come up with a finding and staff had to be convinced that the drainage was sufficient. He asked if that had been researched.

The board, staff, and the applicant discussed the options and semantics of what needed to happen to be able to approve the suggested option for paving on this application, what had been done on the property so far, the fact the property was an island off the highway zoned I-1H, neighboring property which was zoned light industrial which did not require paving and the fact buildings on the applicants property had the same uses as a light industrial zone which did not require paving.

Cork Andrews wanted to mention dust mitigation, water drainage and their solution to that problem. He did not think paving was practical.

Krueger said the existing buildings were not designed for pavement, the area was not designed for pavement and yet by regulation, the board was going to require pavement which would cause problems for the buildings and retention ponds. He believed there had to be a better alternative. He thought that alternative was paving 100 or 200 feet of the access roads.

Hash asked if the board motioned and approved alternative B, could part of the conditions be if they went to DEQ and there

was not a way to mitigate this issue they could come back before the board.

Mouch said yes, they could add a condition which would address that issue in the event that the paving was not possible, or add it to the existing condition.

Hollinger said Hash was right, when they put in the zoning and stipulated paving, they did not foresee repercussions which could happen from those requirements and also the storm water complications from paving.

Klempel spoke of other properties which had been paved with similar complications and resulting problems and dust mitigation.

The board and staff discussed what might be considered reasonable as far as expense to fix the drainage problems which may occur due to the required paving.

Hash asked Jonathan Smith, county attorney, who was at the meeting for another issue, if the board was stretching too far in its requirements for the CUP.

Smith said if DEQ said if the applicant paved it and it couldn't handle the water, then the applicant should be able to come back to the board and ask if they could do something different.

The applicant asked if they could speak.

Hollinger asked them to wait after they had finished the motion.

Cork Andrews said they had not seen the alternate proposal from staff so they did not know what was being proposed.

Zach Andrews said it would cost \$280,000 to build a system of retaining pits and pumping systems to remove the runoff water from the low areas surrounding the buildings. It would be easier for them to remove the buildings than pave.

Harris said the staff report was sent to the applicant at the same time the board packets were sent out.

Zach Andrews said they received the agenda, but not the staff report.

Donna Valade, board secretary said she did send the staff report, if they only received the agenda, she apologized.

**MAIN MOTION  
TO ADOPT  
F.O.F.  
(FZV 09-07)**

Wagner motioned and Klempel seconded the adoption of FZV 09-07 as findings of fact and approve the request for a variance from paving

**BOARD  
DISCUSSION**

Hash said he appreciated both sides of the issue and knew it was difficult for both the planning office and the applicant. He said the applicant did trigger the events which lead them here with his application for a CUP. He was willing to relook at the issue if they were to come back before the board if this variance did not work.

Cork Andrews asked if Hash could explain it to him what the board was contemplating.

Hollinger said the regulations said the area had to be paved. In this circumstance, the request to not pave could be granted if, through DEQ, there was a concrete plan and x amount of dollars the project would cost, and then the applicant would come back, say it was not feasible and then ask for the variance at that time.

Zach Andrews commented the opinion of the paving company did not suffice; it had to be the opinion of an engineer.

The board, applicants and staff discussed why the engineer opinion was appropriate and the cost of paving versus income from the properties.

Krueger said they were looking at granting a variance of not paving in the areas where the hardship of the existing buildings and storm water retention areas were not.

Hollinger thought sometime in the future, the topic would switch from dust in the valley to hot summer air because so much of the valley had been paved.

Wagoner called for the question.

**ROLL CALL  
VOTE  
(FZV 09-07)**

On a roll call vote, the motion passed 3 to 2 with Klempel and Krueger dissenting.



**BOARD  
DISCUSSION**

Cork Andrews asked for clarification on what had been done.

Hollinger clarified.

**OLD BUSINESS**

**FAITH BAPTIST  
CHURCH  
(FZV 09-06)**

A request by Faith Baptist Church for a Zoning Variance to property within the Evergreen, R-2 (One-Family Limited Residential) Zoning District. The applicants are requesting a variance to Section 3.10.040 (3)(A) of the Flathead County Zoning Regulations. The property is located at 108 West Reserve in Kalispell.

***Public Comment is closed for this item.***

**BOARD  
DISCUSSION**

Hash recused himself since he was absent from the meeting in which this application had originally been presented.

Hollinger asked if the applicant would relay to the board what information had been gathered concerning cost estimates to remedy the setback violation.

Clint Theline, Faith Baptist Church, reviewed the estimates, copies of which were before the board. He read an email from their lawyer which concerned the property line. He briefly reviewed the history of what had been done concerning the fence line.

Hollinger asked if staff had any additional information they wished to present.

Mouch discussed the concept of adverse possession and if it would apply in this case. According to her discussion with the county attorneys, only a judge could determine if adverse possession applied to this situation. She discussed the board's powers outlined in MCA. The relevant section did not apply to this situation.

Hollinger asked if it boiled down to a judicial situation.

Mouch said no, it did not. The board could not issue a variance using section 72-2-223 of the MCA to approve the variance even though it did not meet all eight variance criteria.

Krueger said that was his question as well and found they could not do that.

Krueger and Jonathan Smith, county attorney, discussed the situation.

Krueger spoke in detail about the research he had done and his findings concerning the property lines of the property.

Smith asked how many feet the building was in the setback.

Hollinger said six and one half and gave a brief history of what was discussed at the November meeting.

Krueger said an attempt should be made to find the original 1970's survey markers.

Smith said there just was not a hardship to justify the variance.

Mouch said in the applicant's defense, they did not survey from the property line because when they removed the existing shed, they assumed in good faith, that anything beyond that would be well within the setbacks.

Klempel said if they had different surveyors coming up with different property lines where did that put the hardship. She thought that was Krueger's concern as well.

Hollinger said if someone were to discover and come back with the survey from 1970 which placed the line 6 feet further to the south, then they could come back in. He discussed a case where a property owner dug up the surveying pins set the day before and moved those over 10 feet and pounded them back in the ground and the case went to court.

Krueger said in his opinion a portion of the hardship was created by the applicant.

Hollinger said they had to uphold the rules. Unfortunately, at this time the application did not meet the test for a hardship.

The board discussed the past motions from the last meeting.

**MOTION TO  
ACCEPT AS FOF  
AND DENY  
(FZV 09-06)**

Wagoner motioned and Krueger seconded to accept staff report as findings of fact deny FZV 09-06.

**ROLL CALL  
VOTE  
(FZV 09-06)**

On a roll call vote, the motion passed unanimously.

**NEW BUSINESS**

Jonathon Smith updated the board concerning the decision they made about the shooting range in Talley-Bissell which had been appealed to district court.

Hash said the board worked very hard to deliberate in a methodical manner to come to the right decision. The board was always open to ways to improve their deliberations.

Krueger brought up the text amendment change suggested by the county attorney's office to allow the board to revoke Conditional Use Permits (CUPs). He asked Smith to explain the procedure.

Smith said it would be the same way they issue the CUPs. There would be a public hearing, they would listen to the public and staff and then make a decision.

The board and Smith discussed and clarified the criteria for the process.

Smith and Krueger discussed the board's ability to take away a CUP and if it was legal at length.

Wagner commented on a CUP where the board did pull some of the uses on a conditional use permit where the applicant did not follow the conditions.

Smith and Tara Fugina, deputy county attorney, continued to clarify how the board would revoke a conditional use permit.

Krueger said this process needed to be handled in court and went on to explain why he felt that way.

Klempel asked what would happen with frivolous allegations.

Smith said the planning office would not bring frivolous allegations to the board.

Krueger and Smith had a heated discussion over what had been done and what should have been done with the proposed transfer of a CUP and procedures.

Hollinger said all of the board's decisions could be appealed to court. Even the revocation of a CUP could be appealed. He said that may help streamline the process.

The board, staff, Smith and Fugina discussed more of what the text amendment would mean for the board, what it entailed and how often the board would hear a problem with a CUP which would mean revocation.

Harris pointed out in the staff report what the board's role would be concerning a revocation. He moved on to the commissioner approved zoning text amendment for 'gravel extraction'. He handed out what the commissioners approved.

Hollinger asked if it was approved.

Harris said it was approved, but not adopted. Right now it was going through a public protest period.

Smith said they had already had the public hearing and explained what steps were next before it would be adopted.

Harris explained what the text amendment meant to the board and how it applied to applications which they may hear.

The board and staff discussed the amendment briefly.

Harris passed out handouts and explained briefly the peer review conducted by the Montana Association of Planners and the action plan the office had formulated to implement the recommendations from the committee.

Wagoner said he was at the peer review and the planning office received good marks overall.

Harris said there were some criticisms, but overall, they were very positive about the office. He also handed out the calendar year '09 report from the office and explained it briefly. He also

brought up one of the peer review recommendations which was the office should do more in electronically putting up the applications the office received in a place where the public could review them. Staff thought applicants could be allowed to submit their information electronically and were working towards a format to allow that. He asked the board if they would like to receive their information electronically via CD. A cost saving analysis was performed and \$4,000 to \$5,000 in paper could be saved if staff could give the board their information on disks as opposed to the packets they now received. Usually, the packets were given back to staff to recycle after the meetings.

Hollinger said he probably did not have a problem with that, but notebook computers would most likely be part and parcel of the meetings. The board would need whatever electrical accommodations necessary for that operation.

Harris said right now they were unable to provide laptops for the members.

Hollinger said he understood that.

Harris said staff was already receiving feedback not everyone wanted to have their information sent in electronic format. He asked if any of them would like to have their information electronically.

Hash said they were all getting to that point with technology. He needed something that he could have in front of him that he could make notes on. He did not have a laptop computer he could bring to the meetings. If staff sent the information to him electronically, then it would be his cost to print out the information so he could have something to flip through and make notes on.

Harris said they did not want him to have to do that, it was not appropriate.

Hash said he needed something to flip through because he was not always on the same page as everyone else.

Hollinger said he was a paper person as well, but he would try it just to see if he could make the mental jump. If he could not then he wanted to go back to the old way.

Harris said staff would not force this change on the board members. It would not be implemented for several more meetings. Staff was simply trying to get a feel for what the board members felt about receiving things electronically. If they were not receptive, it was fine with staff.

Hash said they were all receptive to the concept.

Hollinger asked for clarification on what the capabilities would be with the improvements in the conference room.

Harris clarified the upgrades. He also said the final goal would be to have the item on the agenda online and be able to click on the item and the information would come up.

Hash wanted to let the staff who presented tonight, Mouch and Hagemier to know their presentations were excellent and they were very helpful to the board in their answers to their questions when they thought outside the box. He felt Krueger thought outside the box which made staff think outside the box. He thought the board, even if the applicants might not think this way, had a lot of compassion. As long as it did not affect safety or environmental things, they tried to make things work for people. But, he needed the planning office to keep them within their boundaries. He used the Nodding Onion application tonight as an example.

The board and staff discussed the challenges with applications at length.

**ADJOURNMENT** The meeting was adjourned at approximately 9:05 pm. on a motion by Wagoner. The next meeting will be held at 6:00 p.m. on April 6, 2010.

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Scott Hollinger, President

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Donna Valade, Recording Secretary

*APPROVED AS SUBMITTED/CORRECTED: 4/6/10*